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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

Appeal from the United States District Court for the District of Delaware

JURISDICTIONAL STATEMENT

DAVID P. BUCKSON,
Attorney General of the State of Delaware,
Dover, Delaware,

E. NORMAN VEASEY,
Chief Deputy Attorney General of the State of Delaware,
Public Building,
Wilmington 1, Delaware,

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 36, D. C.,

JANUAR D. BOVE, JR.,
Beneficial Building,
Wilmington 99, Delaware,

JAMES H. HUGHES, III,
325 South State Street,
Dover, Delaware,

FRANK O'DONNELL,
Delaware Trust Building,
Wilmington 1, Delaware,

N. MAXSON TERRY,
48 The Green,
Dover, Delaware,

Counsel for the Appellants.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court below granting a limited stay (Appendix A(1), *infra*, pp. A1-A6) is reported at 207 F. Supp. 205. The opinion of the court below overruling the motion to dismiss (Appendix A(2), *infra*, pp. A6-A8) is reported at 210 F. Supp. 395. The opinion of the court below denying plaintiffs' motion for a preliminary injunc-

tion and denying defendants' motion for a further stay (Appendix A(3), *infra*, pp. A8-A16) is reported at 210 F. Supp. 396. The opinion of the court below holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States the apportionment provisions of the Delaware Constitution of 1897 and the apportionment amendment to the Delaware Constitution adopted in 1963, together with the concurring and dissenting opinions delivered there (Appendix A(4), *infra*, pp. A16-A67), are reported at 215 F. Supp. 169.

JURISDICTION

(i) This was an action brought pursuant to 28 U. S. C. §§1343 and 2281 and 42 U. S. C. §1983 to restrain enforcement of the apportionment provisions of the Constitution of Delaware, to restrain all further elections to the Delaware General Assembly, and to obtain a reapportionment of that body by Federal judicial decree, heard by a district court of three judges under 28 U. S. C. §2284.

(ii) (a) The final decree of the district court (Appendix B, *infra*, p. A68), declaring unconstitutional under the XIV Amendment both the apportionment provisions of the Delaware Constitution of 1897 and the 1963 reapportionment amendment to that Constitution, was entered on April 30, 1963. The notice of appeal from said final decree was filed in the court below on May 28, 1963.

(b) The injunction of the district court (Appendix C, *infra*, pp. A69-A70), enjoining the holding of any elections for members of the Delaware General Assembly under both of the foregoing provisions of the Delaware Constitution, was entered on May 20, 1963, on the district court's own motion, without notice or hearing. A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963. The notice of appeal from the injunction and from denial of the motion to stay was filed in the court below on June 12, 1963.

(c) On June 27, 1963, Mr. Justice Brennan stayed the foregoing injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

(d) Pursuant to this Court's Rule 15(3), both appeals are being treated as a single case.

(iii) The jurisdiction of this Court to review the decree and injunction below by appeal is conferred by 28 U. S. C. §1253.

(iv) The cases relied on to establish the substantiality of the questions presented by these appeals are *W.M.C.A., Inc.* v. *Simon*, No. 20, this Term; *Reynolds* v. *Sims*, No. 23, this Term; *Vann* v. *Frink*, No. 27, this Term; *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term; *McConnell* v. *Frink*, No. 41, this Term; and *Davis* v. *Mann*, No. 69, this Term, in each of which this Court noted probable jurisdiction on June 10, 1963.

(v) The provisions of the Delaware Constitution that the court below held violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, Section 2 of Article II of the Delaware Constitution of 1897, and the amendment thereto effected in 1963, are set out in full in Appendix D, *infra*, at pp. A71-A75 and A77-A81.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States preclude the State of Delaware from employing the Federal system of a House of Representatives based on population and a Senate based on equal representation for each county in constituting the General Assembly of the State?

2. Did the court below err in entering a blanket injunction restraining the holding of any election pertaining to the members of the General Assembly under the appor-

tionment provisions of the Delaware Constitution, both before and after the 1963 amendment thereto, on the ground that such constitutional provisions, which provided among other things for area representation in the Delaware Senate, and that did not conform to the apportionment guidelines for the Delaware House of Representatives formulated by the court below, were in consequence of both reasons violative of the Fourteenth Amendment to the Constitution of the United States?

3. Does the apportionment of the membership of the Delaware House of Representatives effected by the 1963 amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

4. Does the apportionment of the membership of the Delaware Senate effected by the 1963 amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

5. Does the Fourteenth Amendment to the Constitution of the United States require the General Assembly of the State of Delaware to be reapportioned according to the precepts, standards, principles and guidelines set forth and discussed in the opinion of the court below dated April 17, 1963?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States and of the Constitution of Delaware involved in this case are set forth in Appendix D, *infra*, pp. A71-A81.

STATEMENT

This was an action by seven individuals, seeking to restrain the enforcement of the apportionment provisions of the Delaware Constitution of 1897 then in force, and asking in addition that the United States Court for the District of Delaware reapportion the legislature of that State,

brought against virtually every official of Delaware charged with responsibility for elections therein, including the Chancellor and the Judges of the Superior Court (who took no position on the merits of the case). While the action was pending, and under its impetus, two successive General Assemblies concurred in amending the State Constitution to effect a reapportionment.

Thereafter, the court below held unconstitutional under the Fourteenth Amendment both the apportionment provision of the 1897 Delaware Constitution as well as the amendment thereto effected in 1963; entered a decree to that effect; and later enjoined the holding of all elections to the General Assembly of Delaware under either constitutional provision. This injunction was thereafter stayed by the Circuit Justice; as will be pointed out below, pp. 19-21, the injunction and the decree together effectively preclude any amendment of the Delaware Constitution under either of the means prescribed by that instrument.

A. Delaware Apportionment When Suit Was Brought

Article II, Section 2, of the Delaware Constitution of 1897 (Appendix D, *infra*, pp. A71-A75), in force when the present action was commenced, divided the State into 17 Senatorial and 35 Representative Districts. Seven Senatorial Districts and ten Representative Districts each were assigned to Sussex County, to Kent County, and to rural New Castle County—"rural" in this connection means that portion of the latter county which excludes the City of Wilmington—while Wilmington was assigned two Senatorial and five Representative Districts (Pretrial Order, hereinafter "PTO", ¶¶C4-5). The debates in the 1897 Constitutional Convention show that this plan represented a compromise (PTO, ¶C10).

In 1897, the population of Delaware was about 180,000, of which Sussex County had 38,000, Kent County 32,000,

and New Castle County 105,000 (of whom 70,000 were in Wilmington and 35,000 in rural New Castle County) (PTO, ¶C9).

By 1960, the population of Delaware had risen to 446,292, divided as follows: Sussex County, 73,195; Kent County, 65,651; New Castle County, 307,446 (Wilmington, 95,827; rural New Castle County, 211,619) (PTO, ¶C13). By 1960, also, the population of the several Representative Districts varied from a low of 1,643 to a high of 58,228, while the Senatorial Districts ranged from 4,177 to 64,820 (PTO, ¶¶C14-17; Appendix A(4), *infra;* at pp. A22-A27).

B. Initial Steps in Present Action: Delaware Constitution Amended

The present action was brought on June 5, 1962 (*infra*, p. A14). It sought a declaration that the apportionment provisions of the Delaware Constitution of 1897 were unconstitutional; an injunction against the holding of any elections to the General Assembly; an order reapportioning the Representative and Senatorial Districts of Delaware according to population; or, alternatively, an order directing that the 1962 elections to the General Assembly be on an at-large basis.

On July 25, 1962, the court below stayed the proceedings until August 7. In its opinion (Appendix A(1), *infra*, pp. A1, A4-A5), rendered before any evidence was heard, the district court emphasized the need for haste, saying:

> "It is not necessary to state here fully the exigencies presented by the election laws of Delaware, constitutional provisions aside. The primary election this year must be held on the third Saturday in August: viz., on Saturday, August 18, 1962. It is necessary for the duly authorized officers of the political parties to notify the Department of Elections of the need for a primary election by the first Saturday in August; i.e., by Saturday, August 4, 1962. Publication of the time and places for holding primary elections must be made at least five days prior to the time the primary election

is to be held: i.e., probably as a practical matter by Saturday, August 11, 1962. If the Constitution is to be amended publication of the proposed amendment must be made by August 6, 1962. The sum of the foregoing is that definite and positive action should be taken by the present General Assembly prior to August 4, 1962, and must be taken by the present General Assembly no later than August 5, 1962, or nothing constructive can be accomplished, at least through the means of the legislative branch of our State Government without months if not years of futile delay: in all probability not until after the general election of 1966.

"We point out what we are sure will be obvious to the electors of this State that insofar as members of the General Assembly are concerned, if there is no valid primary election there can be no valid general election. Without a valid election law there can be no *de jure* elections either primary or general, insofar as membership in the General Assembly is concerned. Finally, and perhaps at the risk of needless repetition, we reiterate that if the apportionment provisions of Section 2 of Article 2 are held invalid, we can perceive difficulty in convening a *de jure* legislature. Without a *de jure* General Assembly it is difficult to perceive how valid legislative acts can be enacted. The unpleasant results would be far reaching."

The court below also suggested that the Delaware General Assembly amend the State Constitution so that apportionment would thereafter be regulated by statute rather than by constitutional provision, saying (p. A4, *infra*):

"Such an Amendment and such an Act would not only preserve the legislative system of Delaware and the rights of its electors while a permanent effective constitutional provision relating to apportionment could be worked out, but would also afford the State through its elected representatives the opportunity to pass a new apportionment act without undue delay in the event this or another court should declare the initial legislative apportionment statute enacted under such proposal not to be in conformity with the equal protection clause of the 14th Amendment.

> "Whether or not such a plan as outlined above is feasible and merits either consideration or adoption is exclusively within the province of the General Assembly."

Meanwhile, the Governor of Delaware had appointed a Bipartisan Reapportionment Committee (Tr. 526),[1] around July 5, 1962 (Tr. 592), which held a series of meetings from July 12 to 23, at the end of which time it presented its report (Tr. 528-536, 543-547; see Tr. 549-551, 559-564, 576-585, 589-590, for reasons underlying its recommendations, and Def. Ex. 1 for a record of its hearings). The chairman of that Committee testified (Tr. 585):

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could."

The portion of the Committee's report that dealt with an immediate plan of reapportionment became House Bill 574 to amend the State Constitution (Tr. 594) and was duly passed (Tr. 595), while another portion, which proposed to speed up the Constitutional provisions for the calling of a Constitutional Convention, failed to muster the requir[illegible] two-thirds majority (Tr. 594-596). House Bill 574 contained a provision, inserted by way of compromise, which left unchanged the representation formula prescribed by the existing Constitution for the composition of a Constitutional Convention (Tr. 596, 598-599; see Sec. 2B, *infra*, p. A81).

Thereafter, in conformity with the provisions of Art. XVI, Sec. 1, of the Delaware Constitution (Appendix D, *infra*, p. A76), the next General Assembly sitting after a general election had intervened again passed the reapportionment measure as House Bill 3, which became effective early in 1963. It is set out below at pp. A77-A81.

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[1] "Tr." refers to the transcript of evidence taken at the trial.

Briefly, the 1963 reapportionment adds one representative to each of two Representative Districts in Wilmington, one representative to one such District in rural New Castle County, two representatives to two such Districts, and three representatives to another. It made no changes in either Kent or Sussex Counties, so that the net result was to add 10 representatives from New Castle County to the lower house (PTO, ¶¶C21-22).

In the Senate, the amendment results in following the Federal pattern more closely, by giving each County seven senators; the additional members for Kent and Sussex are to be elected at large (PTO, ¶¶C23, 26).

For the effect of the amendment on the population of the several Representative and Senatorial Districts, see pp. A31-A35, *infra*.

The reasons underlying the 1963 reapportionment appear in the record as follows:

On the suggestion of a Wilmington member, the Committee decided to follow the Federal analogy (Tr. 580).

Accordingly, it was decided to retain a bicameral legislature with the Senate on a county basis, while Kent and Sussex were divided on an east-west basis to obtain two more floterial Senators from each without disturbing historical and traditional Senatorial Districts (Tr. 577, 581).

The House was reapportioned on a population basis (Tr. 577), with each existing Representative District retaining one representative, and with a reapportionment every 10 years (Tr. 549-551). After considering various figures (Tr. 559-560, 579), the Committee decided on 15,000 or a major fraction thereof as the limit of each Representative District, based on trends in population growth, the small size of the State, accommodations for the General Assembly, and in order to give a voice to all segments of society and to all practices and customs (Tr. 559-560). In leaving at least one Representative to each existing Representative

District, the Committee proceeded on the basis that, considering population trends, all Districts would soon grow to reach a major fraction of 15,000 (Tr. 561, 590-591).

C. Further Motions; Trial

Defendants' motions to dismiss were denied while the 121st General Assembly was in session, the court saying, among other things (*infra*, p. A8):

> "We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this State apportionment provisions to meet the test laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly."

Thereafter, following the passage on July 30, 1962, by the 121st General Assembly of House Bill 574, all the defendants on August 7 moved for a further stay to enable the 122nd General Assembly, coming into office on January 8, 1963, to be given the opportunity to concur therein and to make it effective as an amendment to the State Constitution.

Plaintiffs countered by asking a preliminary injunction to restrain the general election scheduled for November 1962, and by amending the prayers of their complaint to ask that the court declare the then proposed reapportionment amendment to the Delaware Constitution invalid on the same grounds as the original provision that it superseded.

The district court denied the motion for the preliminary injunction and likewise denied the motion for a stay (Appendix A(3), *infra*, pp. A8-A16), saying at pp. A15-A16:

> "We regret that the 121st General Assembly did not see fit to adopt the suggestion 'as a temporary haven, and not as an ultimate harbor'* made by us, that the

* [Note in original: "See 207 F. Supp. at pp. 206-207."]

embodiment of apportionment provisions be stricken out of the Constitution of Delaware by an amendment to Section 2 of Article II that would prescribe that the composition of the Senate and the House of Representatives of the General Assembly and the terms of office of its members in the future should be as provided by Act of the General Assembly; i. e., provided by statute and not by constitutional provisions. Had the General Assembly pursued the course suggested and proposed such an amendment the 122nd General Assembly would have been able to adopt it. If an apportionment statute, not meeting the standards of the Fourteenth Amendment, had then been enacted by the General Assembly, no further amendment to the Constitution of Delaware would have become necessary. Another statute satisfying the guarantees of the Fourteenth Amendment could simply have been passed. As things stand now, if Section 2 of Article II and the provisions of H.B. 574 be held unconstitutional, no new plan for the composition of the Senate and House of Representatives can be effected under the provisions of Section 1 of Article XVI by a General Assembly until 1965. This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing."

Thereafter, following the formulation of a lengthy pretrial order, the trial began.

At the trial, plaintiffs below called only two witnesses.

One, Dr. Paul Dolan, Professor of Political Science at the University of Delaware (Tr. 29), expressed his belief (Tr. 34) "that the general axiom of one man, one vote should prevail"; that (Tr. 104) population should be the sole factor in any apportionment; that (Tr. 122) a unicameral legislature was best; and that (Tr. 141) Delaware did not need a bicameral legislature.

The other, Dr. Royce Hanson, Associate Professor of Government and Public Administration at American University (Tr. 147-148), is the President of the appellant

Committee in the Maryland reapportionment case here, *Maryland Committee on Fair Representation* v. *Tawes*, No. 29, this Term (Tr. 149-150), in which he seeks judicial approval for some of the views to which he testified, and in which he is intensely interested (Tr. 229-230).

The present appellants called Dr. James K. Pollock, Murfin Professor of Political Science at the University of Michigan (Tr. 328-329), who served as a member of the recent Constitutional Convention in Michigan (Tr. 331-332).

Briefly, Professor Pollock gave more weight to non-population factors in reapportionment, such as sectional interests, social and economic factors, natural resources, tradition, and history, than did the plaintiffs' witnesses (Tr. 333-339, 342, 370-371, 376, 383-384).

In our view, however, exposition in detail of the conflicting views of these three professors of political science would serve no purpose here, not only because one of them is an interested party in a related case, but primarily because those views go simply to the wisdom and desirability of different plans for apportionment. Moreover, most of what the professors said bears out the presiding judge's comment that "it is ceasing to be testimony and becoming a very interesting lecture in electoral machinery." (Tr. 434). Their aggregate "evidence", including colloquies, extends over nearly three-quarters of the transcript.

During the trial, the several professors were asked to comment on a reapportionment plan for the Delaware House of Representatives devised by the court (Court Ex. 4; Tr. 144-147, 168-169, 171-174, 207, 376-378), a plan which was shown to contain at least one arithmetical error (Tr. 704). The record suggests that this was originally a confidential document (Tr. 76-77). In fact it was presented to counsel by the presiding judge at the pretrial conference.

During the course of the trial, plaintiffs proposed a reapportionment plan of their own, based solely on popu-

lation for both houses, which provided for some at-large elections (Pl. Ex. 17-21; Tr. 210-226, 232-234, 296-301, 307-308, 314-316). Thereafter, following a discussion in which plaintiffs called attention to their prayer that the district court reapportion the Delaware legislature (Tr. 303-318), plaintiffs hastily rewrote their plan (Pl. Ex. 24-36; Tr. 664-665, 698, 703), at meetings at which one of the State's major political parties was unrepresented (Tr. 697, 707-709).

D. Counties in Delaware History and Law

The several professors of political science were generally unfamiliar with the history and traditions of the Delaware Counties (Tr. 64, 226-227, 366-376), which were brought to the attention of the court by the State Archivist, Mr. Leon de Valinger, Jr., a recognized authority on Delaware history (Tr. 447-515).

Those traditions had their beginnings in the early Dutch judicial districts in Delaware, of which there were two in 1673; these districts were perpetuated by the Duke of York when they passed out of Dutch hands forever in that year, and in 1680 the Duke created the third county (Tr. 453-454). In 1682, William Penn acquired all three, joined them to Pennsylvania, and in the next year gave them their present names (Tr. 454). Under Penn, the governmental powers and functions of the three counties were substantially expanded (Tr. 455-456).

Originally, the counties on the Delaware were not a separate colony, but shared representation with the other counties in the Pennsylvania Assembly, in which each county had equal county representation (PTO, ¶C40; Tr. 456-457). In 1704, the Delaware counties were granted a separate Assembly, again with equal county representation, but with the same governor as the Pennsylvania counties (PTO, ¶C41; Tr. 456-457). For the text of Penn's charter of 1701, which permitted within three years "a

distinct Assembly for the Territories", i. e., the counties on the Delaware, see 1 Thorpe, *The Federal and State Constitutions* (H. R. Doc. 357, 59th Cong., 2d sess.) 557, 561.[2]

After the Declaration of Independence, the Delaware Counties remained banded together in an Assembly, still with equal county representation (Tr. 460, 467), but sovereignty resided in each of the counties (Tr. 461). From July to September 1776, there was no executive (Tr. 467), and during that period some or all of the three Delaware counties could have joined Pennsylvania or Maryland or formed separate States (Tr. 286-287, 475).

In the early Journals of the Continental Congress, they are referred to in various ways: as "Delaware Counties" (1 J. Cont. Cong. 50; 2 *id.* 12), "the counties on Delaware" (4 *id.* 226), "3 counties" (1 *id.* 28, 29), "Lower Counties" (4 *id.* 400), "the Lower Counties on Delaware" (1 *id.* 82, 103; 2 *id.* 18; 3 *id.* 418, 429), "the Counties of New Castle, Kent and Sussex, on [or "upon"] Delaware" (1 *id.* 90, 105, 115; 3 *id.* 304, note 1), "the three lower counties on Delaware" (4 *id.* 68-69, 80), "the three lower counties of New Castle, Kent, and Sussex on Delaware" (1 *id.* 75-76; cf. 1 *id.* 80), "New Castle, Kent and Sussex on Delaware" (1 *id.* 14, 66), "the three lower counties on Delaware government" (4 *id.* 130, 132; cf. 5 *id.* 436, "counties on Delaware for the use of the militia of that government"), and, as the official name of this loose alliance, "The Government of the Counties of New Castle, Kent, and Sussex, upon Delaware" (Preamble to Del. Const. 1776, 1 Thorpe 562; see 1 J. Cont. Cong. 21). Prior to Statehood, the Journals of the Continental Congress contain only some scattered references to a "Delaware Government" (plate facing 1

[2] Hereinafter cited simply as "Thorpe". The pagination of the seven volumes of this work is consecutive, but in the interest of convenience, the volume number will be indicated in every instance.

J. Cont. Cong. 120; 1 *id.* 28; 3 *id.* 304; 4 *id.* 349, 413; 5 *id.* 436, 440, 631, 644).

We have found no references whatever, in any form of words, to the three counties *of* Delaware.

Then, in September 1776, the State of Delaware was created by a Constitutional Convention attended by ten delegates from each county (Tr. 467). It was not until then that the Journals of the Continental Congress refer to "Delaware State" (6 J. Cont. Cong. 1000, document dated Nov. 8, 1776).

Through successive Constitutions—1776, 1792, and 1831—the three counties were equally represented in the State legislature, each with three members in the upper house, called first the Council and then the Senate, and each having seven representatives in the lower house, called first the House of Assembly and then the House of Representatives. See Del. Const. 1776, Arts. 3 and 4 (1 Thorpe 562); Del. Const. 1792, Art. II, §§2, 3 (1 Thorpe 568, 570-571); Del. Const. 1831, Art. II, §§2, 3 (1 Thorpe 582, 584-585).

Not until the Constitutional Convention of 1852 was consideration given to increased representation for the City of Wilmington, and then the draft Constitution so providing was rejected by the people of Delaware (Tr. 470-471). It was 1897 before any Delaware Constitution deviated from the pattern of equal legislative representation for each county (*supra*, p. 5). Similarly, it was 1897 before any legislative representatives were elected from districts rather than at large from each county (Tr. 491, 514-515).

Counties have continued to be strong governmental units since the formation of the State in the Fall of 1776 (PTO, ¶¶C46-48). Under the statutes of the State, many of which are very old, Delaware counties exercise many functions; see the listing in the opinion below, *infra*, p. A39.

Throughout the trial, the presiding judge emphasized that "The terrible problem here is one of time" (Tr. 357),

repeating his expression about "a box of time" (Tr. 607, 608-609). Towards the close of the hearings, he indicated that the district court might have to draw up a reapportionment plan of its own (Tr. 737).

E. Opinion, Decree and Injunction Below

In a lengthy opinion (Appendix A(4), *infra*, pp. A16-A62), the district court held unconstitutional under the Fourteenth Amendment both the reapportionment provisions of the Delaware Constitution of 1897 and the reapportionment amendment effected in 1963, on the ground that neither plan had a rational or a reasonable basis. The court held that a variation between districts of 1 to 1½ represented the maximum population variance allowable under the Fourteenth Amendment to the Constitution of the United States, and, further, that the Equal Protection Clause required both houses of a State legislature to be apportioned according to population. Judge Biggs again emphasized the time element (*infra*, p. A55): "The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us."

Judge Layton, while concurring as to the House reapportionment, dissented as to the Senate, holding that area representation in one house is perfectly constitutional. However, he concurred in the result, on the ground that the 1963 amendment, which reapportioned both branches of the Delaware legislature, contained no separability clause. *Infra*, pp. A63-A67.

The court accordingly entered a final decree, holding unconstitutional both Delaware Constitutional apportionment provisions (Appendix B, *infra*, p. A68).

Then, although having said that (*infra*, p. A56) "we will allocate to the General Assembly a period of time from the date of our final decree up to and including

October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein", and also "[h]aving the box of time in mind" (p. A56), the district court none the less, on May 20, 1963, on its own motion and without any hearing, entered an injunction against the holding of any election whatever to the General Assembly either under the apportionment provision of the Delaware Constitution of 1897 or under the apportionment amendment effective in 1963 (Appendix C, *infra*, pp. A69-A70). As will be shown below, pp. 19-21, this injunction effectively disables the State of Delaware from amending its Constitution by any of the methods prescribed therein.

A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963, whereupon the present appellants, asserting that the injunction was improvident and that the denial of the motion to stay constituted an abuse of discretion, applied to the Circuit Justice. On June 27, 1963, Mr. Justice Brennan stayed the injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

Notices of appeal from (a) the final decree, and (b) the injunction and the denial of the motion for a stay, were timely filed by all of the defendants except the Chancellor and the Judges. See this Court's Rule 46 (Summons and severance abolished).

THE QUESTIONS ARE SUBSTANTIAL

Inasmuch as the Court on June 10 last noted probable jurisdiction in the Alabama, Maryland, New York, and Virginia reapportionment cases, duly listed above at p. 3, ¶(iv), each of which also involves the question whether the Equal Protection Clause of the Fourteenth Amendment requires both houses of a State legislature to be apportioned according to population, the substantiality of the basic question presented by the present appeal is so obvious that no further argument on that score is necessary.

We therefore address ourselves to the proposition that this Delaware case should not be held to await the outcome of the others, but, because it presents a number of unique features, some or all of which are certain to affect the generalized principles to be drawn from and enunciated for the other cases, it should be fully heard by this Court, either immediately following or shortly after those others, and in any event before the basic issues are decided.

Those unique features are four in number. First, in Delaware, alone of the 50 States, the State was formed by the counties and not *vice versa*. Second, the injunction and decree entered in this case effectually prevent an amendment of the Delaware Constitution by the means prescribed therein. Third, the haste to reapportion by judicial decree that is plainly reflected in the record herein completely disregards the principles that this Court has enunciated for litigation involving a State of the Union. Finally, these appellants are prepared to adduce what up to now has not appeared in any similar case, viz., proof of contemporaneous Congressional construction of the Equal Protection Clause that regarded its provisions as amply satisfied by State constitutions which prescribed area apportionment for State senates.

We shall briefly summarize our conclusions and materials under each of the foregoing headings.

First. In Delaware the Counties made the State and not; as in the other States, *vice versa*. Consequently, one of the stock arguments currently being made against area apportionment in one house of a State legislature is obviously inapplicable here. As the history adduced at the trial has shown, *supra*, pp. 13-15, the Delaware Counties after July 1776 were at best a loose federation. They had an assembly composed of delegates from each of them, but no executive, with the result that sovereignty necessarily resided in each of the three constituent units. Contemporaneous references to them in the Journals of the

Continental Congress as—in variant forms—"the three lower counties on Delaware" make it plain that they were not regarded as forming an indivisible, unitary body. Significantly, the references are always to the counties *on* (or *upon*) Delaware, never to the counties *of* Delaware. Not until September 1776 did the three Delaware Counties, each sending ten delegates, hold a Constitutional Convention and create the State of Delaware.

Thus, whatever may be the case elsewhere, the Federal analogy is fully applicable to, and indeed was anticipated in, Delaware. Just as the several States, loosely allied under the Articles of Confederation, formed the present Federal Union in which each State, regardless of size, has equal representation in the Senate, so the three Lower Counties on the Delaware, loosely associated in an autonomous assembly that after July 1776 lacked any executive, but in which each county had had equal representation from the very beginning, formed a State in September 1776 in both houses of whose legislature, under successive Constitutions for more than a century and a quarter, each county was equally represented. We submit that it does violence to history, to Delaware tradition, and to American Federalism, now to suggest that equal county representation in today's Delaware Senate somehow violates fundamental law.

Second. If, as held by the court below, the apportionment provisions of the Delaware Constitution offend the Fourteenth Amendment; then, as can easly be demonstrated, the decree and injunction entered below (Appendices B and C, *infra*, pp. A68-A70) effectively preclude amendment of that instrument according to its terms.

Article XVI of the Delaware Constitution provides two methods of amendment. Section 1 (*infra*, p. A76), the mode employed in 1962-1963, provides for amendment by the General Assembly by a two-thirds vote of both houses, followed first by a general election, and then by a second

two-thirds vote of both houses of the newly elected General Assembly. Section 2 (*infra*, pp. A76-A77) provides for a Constitutional Convention, to be composed of one member from each representative district plus two additional members from each county.

The court below has effectively disabled the State of Delaware from amending its Constitution by either of those two methods.

(1) The present General Assembly sits until the general election in November 1964. Until that time it can, by a two-thirds vote, initially pass a new apportionment amendment. This amendment, to become effective, must then be similarly passed by the next succeeding General Assembly which will be elected in November 1964, and which will sit until November 1966. But, if the injunction entered below remains in force, no new General Assembly can be elected, and hence no new amendment to the Delaware Constitution can ever be adopted.

(2) The decree below (Appendix B, *infra*, p. A68) declared unconstitutional the apportionment provisions of the 1897 Constitution, Art. II, Sec. 2 (*infra*, pp. A71-A75), with its 35 representative districts, five senators each to Sussex; Kent, and rural New Castle, and two senators to Wilmington, on the footing that this arrangement is neither reasonable nor rational (Appendix A(4), *infra*, at pp. A40-A41). The constitutional convention provision of the same instrument, Art. XVI, Sec. 2 (*infra*, pp. A76-A77), provides for a convention of 41 members, 35 from the several representative districts, plus two from each of the three counties, and this was specifically continued by the 1963 amendment (*infra*, p. A81).

Plainly, if the legislative apportionment provision of the Delaware Constitution is unreasonable or irrational because of the current distribution of Delaware's population, then so is the constitutional convention apportionment provision; if the General Assembly because of mal-

apportionment cannot validly enact legislation, then the convention for the same reason cannot lawfully draft a new constitution. That was our adversaries' view below, see p. A3, *infra*; it seems now, following a full trial, to have been adopted by the district court (*infra*, p. A56).

The net of the foregoing is that a court of the United States, after declaring unconstitutional under the Constitution of the United States the apportionment provisions of a State Constitution, has effectually disabled the State from ever amending that instrument according to its terms. This, we submit, is more than an abuse of discretion. This is an abuse, a gross abuse, of judicial power.

Third. On any objective reading, this record reflects a dominant theme of pressure against a time limit wholly at variance with the principles that this Court has formulated to govern litigation involving States of the Union.

(1) Each of the opinions of the court below emphasizes, in one form or another, a spirit of haste; of pressure, and of let-us-get-on-with-it that permeated that court's approach to the grave problem of refashioning a State's Constitution; see the excerpts quoted at pp. 6-8, 10-11, 16-17, above. We submit that, notwithstanding the presiding judge's disclaimer (Tr. 600), the record amply confirms the view of the Chairman of the Governor's Bipartisan Reapportionment Committee (Tr. 585) that:

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could."

Indeed, the 1963 amendment, which was the result of less than three weeks' deliberation (*supra*, p. 8), bears on its face evidence of composition under pressure; obviously it was impossible to revise the existing Representative and Senatorial Districts in so short a time.

(2) All too plainly, the court below disregarded the principles that should govern litigation involving a State of the Union—and of course the decree and injunction here directly affect the State of Delaware regardless of the docket title of the cause.

In *Virginia* v. *West Virginia*, 220 U. S. 1, 36, this Court said:

> "A long time has elapsed. * * * But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants * * *."

Again, in *Virginia* v. *West Virginia*, 222 U. S. 17, 19-20, this Court said:

> "A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace."

See also *Virginia* v. *West Virginia*, 241 U.S. 531.

Those remarks were made in the controversy involving Virginia's effort to have West Virginia assume its rightful share of the combined States' pre-separation debt—a suit seeking simply a money judgment. See *Virginia* v. *West Virginia*, 238 U.S. 202, for the amount found due. Here, however, in a controversy revolving around the grave problem of a State's very structure of government, where, unlike *Watson* v. *City of Memphis*, 373 U. S. 526,

529, it cannot be said that "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine", the court below, unmindful of the admonitions just quoted, and in the face of the novelty and weight of the mighty issues presented, issued on its own motion and without hearing argument, a peremptory injunction that not only paralyzed a State's electoral machinery but also effectively disabled it from ever amending its own Constitution.

(3) This Court in *Virginia* v. *West Virginia*, 246 U.S. 565, announced its power and determination to enforce a money judgment against a State of the Union. But, very plainly, such a step comes at the end of the judicial process, not to be lightly undertaken or even entertained, and in that instance happily proved unnecessary.[3]

Here, however, in a vastly more complex situation, where State reapportionment by Federal court decree necessarily involves a rewriting of a State constitution, and hence should have been the very last resort, the court below seems to have been irresistibly drawn to that course as the preferred first order of business, and this before any authoritative guidelines had been announced here.

Thus, at the very outset of the litigation, the district court undertook to advise the General Assembly how it should amend the State Constitution (*supra*, pp. 7-8; *infra*, p. A4), and then publicly regretted that its gratuitous ad-

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[3] See W. Va. Acts 1919 (Ex. Sess.), c. 10, providing for payment of judgment partly in cash and partly by bonds that Virginia had agreed to accept at par. For discussions of the enforcement problem, see Coleman, *The State as Defendant under the Federal Constitution*, 31 Harv. L. Rev. 210; Powell, *Coercing a State to Pay a Judgment*, 17 Mich. L. Rev. 1; Fischer, *Enforcement of a Money Judgment against a State*, 12 St. Louis L. Rev. 57; Good, *Judicial Determination of Interstate Disputes*, 26 Neb. L. Rev. 1; cf. Note, *The Virginia-West Virginia Debt Controversy*, 31 Harv. L. Rev. 1158.

vice had not been followed (*supra*, pp. 10-11; *infra*, pp. A15-A16); next, the district court devised a reapportionment plan of its own, and invited the parties to comment on it (*supra*, p. 12); thereafter, the district court invited the plaintiffs below, appellees here, to submit a plan of reapportionment, heard extensive testimony thereon (*supra*, pp. 12-13) and commented on that plan—and on the numerous errors therein—at some length in its final opinion (Appendix A(4), *infra*, pp. A57-A62); additionally, the district court set a deadline for the General Assembly to pass a reapportionment statute, (*infra*, pp. A56-A57), on the footing that there was no longer any valid provision in the Delaware Constitution regulating apportionment, this in the face of the circumstance that as a matter of political stability apportionment had been a constitutional matter in Delaware since 1776; and, finally, by preventing any amendment of the Delaware Constitution in the manner prescribed by that document, the court below virtually assured to itself the task of reapportioning the Delaware General Assembly by Federal judicial decree, a task which, indeed, the plaintiffs urged it to assume, and for which the presiding judge declared himself quite ready (Tr. 737; *accord*, pp. A56-A57, *infra*).

Except only for the pending proposal for a "Court of the Union" to be composed of the fifty Chief Justices of the States, which shall review the judgments of this Court, we know of nothing equally destructive of the State-Federal relationship requisite to the very existence of our Republic as the course so relentlessly pursued—and pressed—by the district court in this case.

Fourth. We are prepared to adduce materials bearing on the contemporaneous Congressional construction of the Fourteenth Amendment—and we emphasize Sec. 5 thereof, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—which demonstrate conclusively that a State constitution providing for area representation in the State Senate was never thought to violate the Equal Protection Clause at the time that

this Clause was first added to the Constitution of the United States.

(1) The Fourteenth Amendment was submitted to the States by Joint Resolution of June 16, 1866, No. 48, 14 Stat. 358, and was proclaimed a part of the Constitution in July 1868. See Proc. No. 11, July 20, 1868, 15 Stat. 706; Proc. No. 13, July 28, 1868, 15 Stat. 708. In the same year, 1868, Congress provided for the readmission of certain former Confederate States that had been subject to the Reconstruction Acts[4] on condition that each ratify the Fourteenth Amendment. Act of June 25, 1868, c. 70, 15 Stat. 73 (Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina); cf. Act of June 22, 1868, c. 69, 15 Stat. 72 (Arkansas, which had already ratified). Two years later, three other former Confederate States that had similarly been under the Reconstruction Acts were separately readmitted. Act of Jan. 26, 1870, c. 10, 16 Stat. 62 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 67 (Mississippi); Act of March 30, 1870, c. 39, 16 Stat. 80 (Texas).

(2) The new constitutions of five of the foregoing States did indeed provide for the apportionment of both houses of the legislature on a basis of population. Ala. Const. 1867, Art. VIII, §§1, 3 (1 Thorpe 132, 145-146); Ark. Const. 1868, Art. V, §8 (1 Thorpe 306, 310-311); Miss. Const. 1868, Art. IV, §§34, 35 (4 Thorpe 2069, 2074); N. C. Const. 1868, Art. II, §§5, 6 (5 Thorpe 2800, 2804); Tex. Const. 1868, Art. IV, §11 (6 Thorpe 3591, 3594-3595).

The new constitutions of three other readmitted States assigned senators by districts; the extent to which their provisions in that regard reflected population, or emphasized area primarily, or what weight they gave to those two factors or to others, is not clear from the face of the documents. Fla. Const. 1868, Art. XIV, §2 (2 Thorpe 704, 719); La. Const. 1868, Tit. II, §22 (3 Thorpe 1449, 1451-

[4] Tennessee, which had been restored by the Joint Resolution of July 24, 1866, No. 73, 14 Stat. 364, escaped Reconstruction.

1453); Va. Const. 1870, Art. V, §3 (7 Thorpe 3871, 3882-3883).

But two of the newly admitted States had adopted constitutions that plainly provided for area representation in one house of the legislature. Georgia's constitution allowed one senator for each district of three contiguous counties, quite unrelated to population. Ga. Const. 1868, Art. III, §2 (2 Thorpe 822, 827-828). South Carolina adopted a constitution in which each county was entitled to one senator, the only nod to population being that Charleston County alone was given two. S. C. Const. 1868, Art. II, §8 (6 Thorpe 3281, 3286).

(3) It is thus apparent that, by admitting these formerly seceded States, the Congress nearest in time to the adoption and ratification of the Fourteenth Amendment interpreted the Equal Protection Clause as not "to prevent the making of social experiments that an important part of the community desires, in the . . . sulated chambers afforded by the several States" (Holmes, J., in *Truax* v. *Corrigan*, 257 U. S. 312, 344), where such social experiments involved area representation in one house of the State legislature. For the statute book makes it clear that Congress scrutinized the new constitutions of the former Confederate States with great care. See the proviso to Sec. 1 and see Sec. 3 of the Act of June 25, 1868, *supra*, 15 Stat. 73, 74, requiring Georgia to annul certain subsections of its constitution as a further prerequisite to readmission; Sec. 8 of the Act of Dec. 22, 1869, c. 3, 16 Stat. 59, 60, requiring ratification by Georgia of the Fifteenth Amendment; and the several provisos to the Virginia, Mississippi, and Texas readmission Acts, *supra*, 16 Stat. at 63, 68, and 81.

Very plainly, therefore, if the Congresses that imposed such requirements had considered Georgia's plan of giving one senator to every three counties regardless of population to be violative of the Equal Protection Clause, or had similarly regarded as contravening that Clause South Carolina's scheme of one senator for each county (with but a single exception), it would necessarily have insisted

that those provisions, also, be expunged or altered. Having regard to the temper of the times, it cannot be supposed for one moment that, if the Reconstruction Congresses had ever considered area representation in one house of a State legislature to constitute a denial of the equal protection of the laws, they would ever have readmitted Georgia—much less South Carolina, which had been first to secede and first to fire on the flag.

From this it necessarily follows that the statement in *MacDougall* v. *Green*, 335 U. S. 281, 283, that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," correctly reflects the original understanding and interpretation of the Equal Protection Clause; and that the view of the court below, that this Clause requires both houses of a State legislature to be apportioned according to population, represents a neo-egalitarian revelation never vouchsafed to the contemporaries of the enactment, ratification, and initial implementation of the Fourteenth Amendment.

Certainly it would be incongruous if the concept of area representation that is not only the basis of our Federal Union but indeed is specifically protected against change by Article V of the United States Constitution, should, when adopted by a constituent State of that Union as the basis of its own political structure, be held to violate the Fourteenth Amendment of the same Constitution. Yet, as Judge Layton pointed out in his dissent (*infra*, pp. A65-A66), the holding of the majority below necessarily means that the constitutional guarantee of two senators to every small State simultaneously violates the constitutional guarantee of the equal protection of the laws to the people of every large State.

We cannot forbear to remark that it would surely be ironic if, now that State legislation has at long last been freed from inflexible interpretations of the Due Process Clause, see *Ferguson* v. *Skrupa*, 372 U. S. 726, State constitutional provisions should in turn become fettered by equally inflexible interpretations of the Equal Protection

Clause that, as here (see Appendix A(4), *infra*, at pp. A35-A37), would irrevocably subject the few and the poor to the domination of the rich and the many.

What this Court said on this point in *MacDougall* v. *Green*, 335 U. S. 281, 284, is, we submit, just as sound today in law and in fact both as when it was written:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

We add only that, so far as we are aware, no court in controversies involving apportionment of a State Senate has troubled to look to contemporaneous Congressional interpretation of the Equal Protection Clause as shown by the readmission of the former Confederate States.

Fifth. Accordingly, the present case should be set down for argument and not simply held to await the outcome of the others, since what has been said strongly suggests that general principles drawn from the records and historical backgrounds in these other cases may require significant modification or qualification in the light of the factors now presented here.

We would undertake to proceed on simultaneous briefs, either on the unprinted record or on an initially abbreviated record, to be supplemented after argument.[5]

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[5] The Appendices to the present Jurisdictional Statement contain all of the opinions, the last of which includes the findings and conclusions below, and hence most of the materials for decision. The complaint with amendments and the pretrial order could easily be printed while the briefs are being prepared. The balance of the record designated by the parties could then be made available in printed form soon after argument.

In any event, the present case contains so many novel and different features, all of which bear materially on the other cases, that those others should not be decided until after this one has first been briefed and argued.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction of this appeal should be noted, and that it should be set down for argument with, or very shortly after, the other reapportionment cases involving the composition of State senates.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 36, D. C.,

DAVID P. BUCKSON,
Attorney General of the State
of Delaware,
Dover, Delaware,

E. NORMAN VEASEY,
Chief Deputy Attorney General
of the State of Delaware,
Public Building,
Wilmington 1, Delaware,

JANUAR D. BOVE, JR.,
Beneficial Building,
Wilmington 99, Delaware,

JAMES H. HUGHES, III,
325 South State Street,
Dover, Delaware,

FRANK O'DONNELL,
Delaware Trust Building,
Wilmington 1, Delaware,

N. MAXSON TERRY,
48 The Green,
Dover, Delaware,

Counsel for the Appellants.

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